U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: May 26, 1999

CASE NO. **1999-INA-90**

In the Matter of:

MOLD-A-MATIC, WEST, INC.
Employer,

on behalf of

RICAREDO B. BALUYUT
Alien.

Appearance: Pro Se

Certifying Officer: Rebecca Marsh Day
San Francisco, CA

Before: Burke, Wood and Vittone
Administrative Law Judges

DECISION AND ORDER

***Per Curiam*.** This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C.§1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United`States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27 (c).

STATEMENT OF THE CASE

On January 25, 1995, the Employer filed an *Application for Alien Employment Certification* (ETA 750A) seeking to employ the Alien as a Quality Control Inspector with the following duties:

> Ensure the assembly and inspection of manufacturing machines such as injection molding, refrigeration, hydraulic motors and cylinders performed according to quality control specifications and record inspection data. Inspect components and parts for conformance to blueprints, drawings and production and assembly manuals using instruments such as micrometer, vernier, calipers and gauges.

The Employer specified that any applicant for the position needed to have 2 years experience in the job offered or 2 years experience in the related occupation of product engineering with working knowledge of quality control specifications for machinery, refrigeration, hydraulic motors and cylinders. The salary offered was $2,500.00 per month.

The ETA 750A was accompanied by a *Statement of Qualifications of Alien* (ETA 750B) in which the Alien represented that he had worked for the Employer since September 1990 as a Machine Technician repairing motors, hydraulic units, hydraulic cylinders, and coin motors, rebuilding machines, inspecting electrical wiring, drilling castings, maintaining and cleaning machines on location and repairing and cleaning bill acceptors.

Twenty-six applicants were referred to the Employer by the California Employment Development Department (EDD). These included Larry L. Klein, whose resume indicated that he had 23 years of experience as a Quality Control Inspector "testing high pressure valves, soldering, printed circuit boards, cable and wiring assemblies, computers, printers, tuners, electronic assemblies."

In an October 21, 1995 answer to a questionnaire sent to him by EDD, Mr. Klein stated that he had been neither contacted nor interviewed by the Employer.

A recruitment report signed by Nichole Escalante, Personnel Manager, was filed on behalf of the Employer on November 24, 1995. Ms. Escalante maintained that she had reviewed all applications and found that 25 of the applicants lacked the requisite experience for the job offered. The remaining applicant reportedly never contacted the employer and his address and phone number had not been furnished. In regard to applicant Klein, Ms. Escalante stated:

> "This applicant was interviewed on November 13, 1995. Mr. Klein is not qualified for the position because he does not have any of the required experience and cannot perform the duties of the position we are offering as quality control inspector. He does not have any verifiable experience in performing duties of the position which include ensuring that the assembly and inspection of manufacturing machines such as injection molding machinery, refrigeration machinery, hydraulic motors, and cylinders...[he] claims experience as a valve inspector and electronic circuit board inspector which are unrelated occupations in unrelated industries."

The CO issued a Notice of Findings (NOF) on March 18, 1997, in which she proposed to deny the application on the bases that the Employer had failed to document that the job offer is bona fide or that U.S. workers have been lawfully rejected. The CO questioned, *inter alia*, whether a current job opening exists and whether the Employer is able to place the Alien on its payroll as required by 20 CFR §656.20 (c)(4). The CO noted in this regard that when checked in 1996, the Employer had not reported a payroll with employees in California since the second quarter of 1995 (ending September 30, 1995). She noted also that there is no telephone listing for the Employer and that an applicant reported that when attempting to obtain an interview the building was locked.

The Employer was directed to show persuasively that there is an on -going business and that an unfilled job opportunity for an employee currently exists. Such evidence was to include the Employer's most recent quarterly payroll tax return showing the total amount of wages paid to employees for the quarter and the number of employees. Additional evidence was to include the Employer's most recent tax return showing an ability to pay a salary of $30,000.00 per year for the position.

In regard to the rejection of U.S. workers, the CO specifically found that Mr. Klein appeared to be unlawfully rejected as his resume shows he clearly exceeds the requirements.

The Employer submitted the following evidence in its rebuttal to the NOF to establish that it was an on-going business:

1. A copy of the company's Articles of Incorporation and Statement of Domestic Stock Corporation;

2. Brochure describing the nature of business; and

3. A letter from Certified Public Accountant, Jerry Markell, verifying that the company is conducting an ongoing business at the address listed on the 750A.

Other evidence submitted included the Employer's 1995 Schedule C (Form 1040), which showed a gross income of $143,999 and a tentative profit of $332. The only wages reported as expenses were $10,000. Sales & Use Tax Returns for the first two quarters of 1996 showed total

sales of $91,100. Mr. Markell's letter was to the effect that the Employer had been in business since June 1978 and that it had a gross income of approximately $280,000 for 1996. He opined that the "gross income" of the business should be sufficient to sustain the compensation of an additional employee at $2,500 per month. Mr. Markell went on to state that a January 1994 earthquake caused substantial losses for the business that could not be accurately assessed until repairs were completed. As they were still in the process of compiling the accounting to accurately claim the losses for 1995 and 1996, extensions were requested to file "appropriate tax returns."

In regard to the rejection of Mr. Klein, the Employer's president, Thomas Irwin, reported that Ms. Escalante was no longer employed by the firm, but that he had reviewed the resume and concurred with her opinion that Mr. Klein was not qualified for the position as he did not have the requisite experience. Such an opinion was also expressed in a letter from the president of R-W Vending, Inc. which distributes machines that are similar to those used by the Employer.

The CO issued a Final Determination on June 17, 1997, denying the application on the bases that the Employer had failed to establish that there was a job for an employee and that it was open to U.S. workers pursuant to 20 CFR §§ 656.3 & 656.20(c)(8), and that it had the ability to pay the salary for the position pursuant to 20 CFR §656.20(c)(4). The also CO found that the Employer's evidence regarding the rejection of Larry Klein was inadequate because his "resume shows 23 years of experience, summarized on a one page resume, and he was not interviewed."

The Employer requested a review of the denial and the record has been submitted to the Board for such purpose.

DISCUSSION

Initially, we note that there is a problem with the basis for the CO's finding regarding applicant Klein. This is because there is a conflict in the evidence as to whether he was interviewed by Ms. Escalante. He reported that he was not interviewed. But, this was on October 21, 1995 while Ms. Escalante claims that she interviewed him on November 13, 1995. Ordinarily the conflict would require a remand for clarification. However, in view of the action we are prepared to take regarding the other basis for the CO's denial, such remand is not necessary.

Section 656.20(c)(1) of the regulations provides that an application for labor certification must clearly show that the employer has enough funds available to pay the wages or salary offered the alien, and §656.20(c)(4) provides that the employer must be able to place the alien on the payroll on or before the date of the alien's proposed entry into the United States. Thus, the CO has the authority to request evidence establishing an employer's ability to pay the proposed salary and may reject the application for failure to submit adequate documentation. *Big George Chinese Restaurant*, 88-INA-362 (Oct. 30, 1989). Although statements from an employer's accountant may be persuasive, they need to be supported by evidence such as signed tax returns. *The*

Whislers, 90-INA-569 (Jan. 31, 1992).

The only tax return submitted in this case does not demonstrate the ability to pay the Alien a salary of $30,000 per year. Indeed, the return shows only a net income of $332 after expenses, including wages of only $10,000.[1] Although the accountant represents that the Employer's **gross** receipts had reached $280,000 in 1996, the only documentation, the sales tax reports, indicate that the Employer was earning at the rate of only $182,000 for that year (i.e., $91,100 for the first six months.) Furthermore, we fail to see how the employer's accountant can predict that the Employer's gross receipts for 1996 in any amount would support an additional salary of $30,000 when he had not yet finished assessing the Employer's financial condition because of expenses for the earthquake. Accordingly, we agree with the CO that the Employer failed to document the ability to pay the Alien's salary or place him on the payroll and certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel:

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

TRS/jw

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1)n when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

[1]The Alien reports that he was already working for the employer during this year which leaves the question as to whether he was paid the $10,000 or was working as an independent contractor. With a payroll of only $10,000 it is difficult to understand why the Employer needed a Personnel Director.

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Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.